



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF K-I-F-R-, INC.

DATE: NOV. 29, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a healthcare facility, seeks an EB-2 immigrant visa to classify the Beneficiary, a physical therapist, as a member of the professions holding an advanced degree who is employed in a Schedule A, Group I occupation. See Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2); section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i); 20 C.F.R. § 656.5(a). The U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. professional nurses and physical therapists who are able, willing, qualified, and available for these occupations, and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of foreign nationals. 20 C.F.R. § 656.5.

The Director of the Nebraska Service Center denied the petition, concluding that the notice of filing listed a rate of pay that was below the prevailing wage.

The matter is now before us on appeal. In its appeal, the Petitioner resubmits the initial filing and maintains that the Director erred by comparing the posted annual wage calculated using 35 hours per week with the prevailing annual wage calculated at 40 hours per week.

Upon *de novo* review, we will sustain the appeal.

I. LAW

Section 203(b)(2)(A) of the Act provides classification to qualified individuals who are members of the professions holding advanced degrees or their equivalent. Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified ETA Form 9089, Application for Alien Employment Certification, from DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with an uncertified ETA Form 9089, in duplicate. 8 C.F.R. §§ 204.5(a)(2) and (k)(4); see also 20 C.F.R. § 656.15(a).

DOL's regulation at 20 C.F.R. § 656.15(b), which relates to Schedule A petitions, provides the following:

General documentation requirements. A Schedule A application must include:

- (1) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with §§ 656.40 and 656.41.
- (2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.10(d).

The referenced regulation at 20 C.F.R. § 656.10(d)(6) prescribes:

If an application is filed under the Schedule A procedures at § 656.15, or the procedures for shepherders at § 656.16, the notice must contain a description of the job and rate of pay, and must meet the requirements of this section.

One requirement in that section, at 20 C.F.R. § 656.10(c)(1), is that the employer must attest:

The offered wage equals or exceeds the prevailing wage determined pursuant to § 656.40 and § 656.41, and the wage the employer will pay to the alien to begin work will equal or exceed the prevailing wage that is applicable at the time the alien begins work or from the time the alien is admitted to take up the certified employment[.]

II. ANALYSIS

The Petitioner filed the Form I-140, Immigrant Petition for Alien Worker, accompanied by an uncertified ETA Form 9089; a notice of filing; a prevailing wage determination; and the Beneficiary's qualifications as a physical therapist, including her license and doctor of physical therapy degree. The sole issue on appeal is whether the Petitioner listed the proper rate of pay on the notice of filing. For the reasons discussed below, we find that the "rate of pay" the Petitioner listed on the notice of filing is the rate it has offered the Beneficiary.

The relevant forms include the ETA Form 9141, Application for Prevailing Wage Determination, the ETA Form 9089, and the notice of filing. The ETA Form 9141 provides that the prevailing wage is \$71,635 annually. The ETA Form 9089 lists the same prevailing wage and a range for the offered wage. Specifically, the range, expressed in both hourly and annual rates, is from "\$72,800/yr or \$35/hr" to "\$87,360/yr or \$42/hr." Finally, the notice of filing indicates a "salary" of \$35 per hour to \$42 per hour. That notice also, however, lists the hours as 35 per week. Based on the number of hours, the Director calculated an "annual salary" of \$63,700. On appeal, the Petitioner contends that a "salary" is independent of the number of hours worked and, thus, the Director used the wrong terminology. The Petitioner further notes that DOL calculates prevailing wage determinations based on a 40 hour week, and that an hourly prevailing wage of \$34.44 can be extrapolated from the annual prevailing wage. The Petitioner concludes that the notice of filing "listed an hourly wage of \$35-\$42

per hour, with an expectation of at least 35 hours of work per week,” which exceeded the prevailing hourly wage.

The notice of filing lists the hours as 35, not “at least 35 hours.” Nevertheless, whether or not the number of hours might create an impression that the annual wage could be as low as \$63,700, at issue on appeal is whether the Petitioner correctly listed the job’s “rate of pay” on the notice of filing pursuant to 20 C.F.R. § 656.10(d)(6). The “rate of pay” on the notice of filing is a range of \$35 to \$42 hourly. This range is the same range that appears on the ETA Form 9089 as the offered wage. A related but separate question is whether the offered wage (between \$72,800 and \$87,360 annually) equals or exceeds the prevailing wage. 20 C.F.R. § 656.10(c)(1). As the prevailing annual wage is \$71,635, the offered wage is sufficient. Ultimately, the notice of filing provides accurate rate of pay information to an employee reading it to confirm that the Petitioner is not tendering a different hourly wage to foreign employees.¹ In light of the above, the Petitioner’s notice of filing complies with the plain language of the regulations.

III. CONCLUSION

The burden is on the Petitioner to show eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Petitioner in this case has established by a preponderance of the evidence that the Beneficiary qualifies as an advanced degree professional, and it has complied with the requirements for Schedule A, Group II designation. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.

Cite as *Matter of K-I-F-R-, Inc.*, ID# 80668 (AAO Nov. 29, 2016)

¹ Although the notice of filing retains a residual purpose of recruitment, the purpose of the job posting under the permanent labor certification regulations evolved, and under the PERM regulations its primary purpose is to provide notice to interested persons of the filing of the labor certification. *Vision Scenery Corp., Inc.*, 2011-PER-02384 (BALCA 2012). Unlike non-Schedule A labor certification applications that fall under the jurisdiction of DOL, schedule A has no recruitment requirements. *Compare Libre Mgmt. LLC*, 2011-PER-00221 (BALCA 2011) (interpreting 20 C.F.R. § 656.17(f)(7) and 20 C.F.R. § 656.10(d)(4), provisions that do not apply to Schedule A filings).